No. 06-930

In the Supreme Court of the United States

HAROON RASHID, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 18 U.S.C. 16(b), an offense is a "crime of violence" if it "is a felony" and "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The question presented is whether an offense is a "felony" under that provision if, although it is punishable by more than one year of imprisonment, it is classified as a "misdemeanor" under state law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not published in the *Federal Reporter* but is reprinted in 190 Fed. Appx. 676. The decisions of the Board of Immigration Appeals (Pet. App. B) and the immigration judge (Pet. App. D) are unreported. The prior decision of the Board of Immigration Appeals (Mot. to Vacate Stay App. C)[1] is not published in the *Administrative Decisions Under Immigration & Nationality Laws* but is available at 2004 WL 2943549. The prior decision of the immigration judge (Mot. to Vacate Stay App. B) is unreported.

[1] "Mot. to Vacate Stay" refers to the motion filed by the government on December 15, 2006, to vacate the stay of petitioner's removal that previously had been granted by Justice Breyer. See note 2, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2006. The petition for a writ of certiorari was filed on November 1, 2006, and was placed on the Court's docket on January 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Pakistan who entered the United States as a legal permanent resident in 1997. Gov't C.A. Br. 4. In March 2004, he was convicted, after a jury trial, of assault in the third degree, in violation of Section 18-3-204 of the Colorado Revised Statutes. *Id.* at 5; Mot. to Vacate Stay App. B at 1. Third-degree assault in Colorado is a "class 1 misdemeanor," Colo. Rev. Stat. § 18-3-204 (2004), which is punishable by a maximum of 18 months of imprisonment, *id.* § 18-1.3-501(1). Petitioner was sentenced to 401 days in jail, 366 of which were suspended. Gov't C.A. Br. 5.

In April 2004, the Department of Homeland Security (DHS) commenced removal proceedings against petitioner. Gov't C.A. Br. 4. It alleged that he was removable pursuant to 8 U.S.C. 1227(a)(2)(A)(iii), because the assault of which he was convicted was a "crime of violence" under 18 U.S.C. 16 for which the term of imprisonment was at least one year, and the offense was therefore an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F). Gov't C.A. Br. 4. The term "crime of violence" is defined in 18 U.S.C. 16(b), the subsection relevant here, as "any * * * offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

2. In his brief submitted to the immigration judge (IJ), petitioner conceded that the assault of which he was convicted is a "felony" within the meaning of 18 U.S.C. 16(b). Specifically, petitioner stated:

> The federal definition of "felony" includes an offense if it is one for which the maximum term of imprisonment authorized is, at a minimum, "more than 1 year." 18 U.S.C. Section 3559(a)(5) (1994). In Colorado, the maximum sentence for a class 1 misdemeanor is 18 months imprisonment. Section 18-1.3-501 C.R.S. Therefore, the state misdemeanor offense of assault in the third degree meets the federal definition of "felony."

Mot. to Vacate Stay App. A at 3. Petitioner argued, however, that the Colorado offense of third-degree assault is not a "crime of violence" under Section 16(b) because the state statute does not "require[] the government to prove that force was used in causing injury, or that intentional use of force was used in causing injury." *Ibid.*

The IJ agreed with petitioner that he had been convicted of a "felony," noting that, although third-degree assault is designated as a class 1 misdemeanor under state law, "the punishment available is 18 months" and the offense therefore "is considered a felony under [federal] standards." Mot. to Vacate Stay App. B at 2. The IJ nevertheless concluded that the assault was not a "crime of violence," because it did not satisfy the other requirements of Section 16(b). *Id.* at 2-3. The IJ therefore ruled that the charge of removability had not been sustained. Mot. to Vacate Stay App. B.

DHS appealed, and the Board of Immigration Appeals (BIA) reversed. Mot. to Vacate Stay App. C. The

BIA noted in its decision that the IJ had apparently found petitioner's offense "to be a felony under federal law since it carried a possible sentence of 18 months." *Id.* at 2. Relying on the record of conviction, however, the BIA held that the IJ had erred in concluding that the assault did not otherwise satisfy the requirements of Section 16(b). *Id.* at 2-3.

On remand, the IJ ordered petitioner removed to Pakistan. Pet. App. D. Petitioner then appealed to the BIA. In his brief, he argued that he did not have the requisite mens rea for a "crime of violence," Mot. to Vacate Stay App. D at 1-2, but again conceded that the Colorado offense of which he was convicted "meets the federal definition of 'felony,'" *id.* at 1. The BIA dismissed the appeal. Pet. App. B.

3. Petitioner filed a petition for review in the court of appeals, claiming that the assault of which he was convicted was not a "crime of violence." He made a number of arguments in support of that claim, but, consistent with his position before the agency, he did not argue that the offense was not a "felony" under 18 U.S.C. 16(b). Pet. C.A. Br. 19-31; Pet. C.A. Reply Br. 10-25.

The court of appeals rejected petitioner's claim, and denied the petition for review, in an unpublished per curiam opinion. Pet. App. A. In holding that the assault was a "crime of violence" under Section 16(b), the court reasoned that the jury instructions in the criminal case were such that the guilty verdict necessarily reflected a finding that the crime involved a substantial risk that petitioner would use physical force against the victim. *Id.* at 5-6. In a footnote, the court observed that the BIA had "characterized the [assault] conviction as a fel-

ony under federal law" and that petitioner "does not challenge this ruling." *Id.* at 3 n.2.[2]

ARGUMENT

Petitioner contends (Pet. 3-8) that the assault of which he was convicted is not a "felony" under 18 U.S.C. 16(b) because, even though it is punishable by a maximum of 18 months of imprisonment, it is classified as a misdemeanor under state law. That contention was not administratively exhausted; it was not pressed or passed upon in the court of appeals; it is without merit; and it is not the basis of a circuit conflict. Further review is therefore unwarranted.

1. Under 8 U.S.C. 1252(d)(1), "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." The courts of appeals have uniformly held that an alien challenging an order of removal is required to exhaust particular issues in the administrative process. That is, an alien must not only appeal to the BIA before seeking judicial review, he must raise before the BIA every claim that he wishes to be consid-

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[2] After denying the petition for review, the court of appeals granted petitioner a stay of deportation pending the disposition of his certiorari petition. Stay Appl. Attach 2. The court subsequently vacated the stay, however, Stay Appl. Attach 3, on the ground that the certiorari petition "seeks review of matters that petitioner failed to preserve in earlier proceedings," *id.* at 1. Petitioner then applied for a stay from this Court. Justice Breyer granted the application and entered a stay of deportation pending the disposition of the certiorari petition (or, in the event that certiorari is granted, the judgment on the merits). No. 06A557 (Dec. 6, 2006). The government has filed a motion to vacate the stay. That motion has been fully briefed and is still pending.

ered by the reviewing court.[3] Indeed, with the exception of the Second Circuit, see *Zhong* v. *United States Dep't of Justice*, 461 F.3d 101, 131-132 (2006) (Kearse, J., dissenting), the courts of appeals have uniformly treated the requirement of issue exhaustion in removal cases as not only mandatory but jurisdictional.[4]

Far from having raised before the agency the claim that he raises in his certiorari petition, petitioner affirmatively conceded both before the IJ and before the BIA that the Colorado offense of which he was convicted "meets the * * * definition of 'felony'" in 18 U.S.C. 16(b). Mot. to Vacate Stay App. A at 3; *id.* App. D at 1. He has therefore failed to exhaust administrative remedies, and there is accordingly a statutory bar to judicial review of the claim. For that reason alone, certiorari should be denied.

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[3] See, *e.g.*, *Berrio-Barrera* v. *Gonzales*, 460 F.3d 163, 167 (1st Cir. 2006); *Foster* v. *INS*, 376 F.3d 75, 78 (2d Cir. 2004) (per curiam); *Xie* v. *Ashcroft*, 359 F.3d 239, 245 n.8 (3d Cir. 2004); *Gandziami-Mickhou* v. *Gonzales*, 445 F.3d 351, 359 n.2 (4th Cir. 2006); *Wang* v. *Ashcroft*, 260 F.3d 448, 452-453 (5th Cir. 2001); *Sterkaj* v. *Gonzales*, 439 F.3d 273, 279 (6th Cir. 2006); *Capric* v. *Ashcroft*, 355 F.3d 1075, 1087 (7th Cir. 2004); *Alyas* v. *Gonzales*, 419 F.3d 756, 762 (8th Cir. 2005); *Zara* v. *Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 (10th Cir. 1999) (per curiam); *Fernandez-Bernal* v. *Attorney Gen.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001).

[4] On January 17, 2007, the Second Circuit denied the government's petition for rehearing en banc in *Zhong*, *supra*, the case that held that issue exhaustion is not a jurisdictional requirement. At the same time, however, the panel amended its opinion to clarify the scope of its decision: "[I]n holding that, though not jurisdictional, issue exhaustion is mandatory, the [panel] majority expects that virtually no case will be decided differently from the way it would be were the requirement deemed jurisdictional." *Zhong* v. *United States Dep't of Justice*, No. 02-4882, slip op. 3 n.1.

2. Quite apart from the failure to satisfy the requirement of 8 U.S.C. 1252(d)(1) by raising the issue before the BIA, petitioner did not raise in the court of appeals the claim that he raises in his certiorari petition, see Pet. C.A. Br. 19-31; Pet. C.A. Reply Br. 10-25, and the court of appeals did not decide that claim. The court merely noted that the BIA had "characterized the [assault] conviction as a felony under federal law" and that petitioner "does not challenge this ruling." Pet. App. A at 3 n.2. This Court's "traditional rule * * * precludes a grant of certiorari," absent exceptional circumstances, "when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (quoting *id.* at 58 (Stevens, J., dissenting)); see, *e.g.*, *Evans* v. *Chavis*, 126 S. Ct. 846, 854 (2006); *Clingman* v. *Beaver*, 544 U.S. 581, 598 (2005); *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004). And petitioner points to no "exceptional circumstances," *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004), that would justify a deviation from that traditional rule in this case.

3. The contention raised in the certiorari petition is in any event without merit. As explained below, an offense punishable by more than one year of imprisonment is a "felony" under 18 U.S.C. 16(b), even if it is classified as a "misdemeanor" under state law.

a. Title 18 of the United States Code contains no specific definition of "felony." When a word is not defined by statute, however, courts "normally construe it in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). Longstanding usage of the term "felony" in Title 18 focuses, not on the label placed on the crime, but on the "severity

of the punishment" imposed by the convicting jurisdiction. *Jerome* v. *United States*, 318 U.S. 101, 108 n.6 (1943). Throughout Title 18, unless otherwise indicated, the term "felony" has been understood to refer to a crime punishable by death or imprisonment for more than one year. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 272 n.2 (1942).[5] Indeed, until 1984, Congress specifically defined "felony" in Title 18 as "[a]ny offense punishable by death or imprisonment for a term exceeding one year." 18 U.S.C. 1(1) (1982). In 1984, Congress replaced that provision with 18 U.S.C. 3559, which, while lacking a specific definition, continues to classify all federal criminal offenses for sentencing purposes based on the length of the "maximum term of imprisonment authorized" and to make any offense for which the authorized penalty is more than one year of imprisonment a felony. 18 U.S.C. 3559(a); see also Sentencing Guidelines § 2L1.2, comment. (n.2) (defining "felony" as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year").

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[5] Accord *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002) ("Congress has a longstanding practice of equating the term 'felony' with offenses punishable by more than one year's imprisonment."); *United States* v. *Urias-Escobar*, 281 F.3d 165, 167 (5th Cir.) ("federal law traditionally defines a felony as a crime punishable by over one year's imprisonment") (emphasis omitted), cert. denied, 536 U.S. 913 (2002); *United States* v. *Graham*, 169 F.3d 787, 792 (3d Cir.) ("The one-year mark was used by Congress as early as 1865."), cert. denied, 528 U.S. 845 (1999); *United States* v. *Burston*, 159 F.3d 1328, 1335 n.13 (11th Cir. 1998) (the "traditional definition of a felony" is an offense "punishable by death or imprisonment in excess of one year") (quoting Fed. R. Evid. 609(a)(1) and (c)); *United States* v. *Page*, 84 F.3d 38, 41 (1st Cir. 1996) ("felony" has "long been defined as 'any offense punishable by death or imprisonment for a term exceeding one year' ") (quoting 18 U.S.C. 1(1) (1982)).

The longstanding definition of "felony" is repeated, either in terms or in substance, throughout the United States Code.[6]

Courts are thus properly "reluctant to infer, absent a clear indication to the contrary, that Congress intended to abandon its long-established practice of using the term 'felony' to describe offenses punishable by more than one year's imprisonment." *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002). There is no such indication to the contrary, much less a *clear* indication to the contrary, in 18 U.S.C. 16(b). Instead, all indications are that Congress did *not* intend that the determination of whether a person has been convicted of a "crime of violence" under Section 16(b) would turn on whether a crime punishable by more than one year in prison happened to be called a "felony" or a "misdemeanor" by the convicting jurisdiction.

First, defining "felony" by reference to the maximum punishment authorized for an offense under the law of the convicting jurisdiction provides a level of uniformity by preventing the federal consequences of a state-law conviction from turning upon varying nomenclature. See *Small* v. *United States*, 544 U.S. 385, 393 (2005); cf. *Lopez* v. *Gonzales*, 127 S. Ct. 625, 633 (2006) (rejecting interpretation of 8 U.S.C. 1101(a)(43)(B) that would result in "state-by-state disparity"). Second, by identifying the offenses covered by Section 16(b) as felonies, Congress obviously wanted to ensure that crimes of a particular degree of seriousness were included, and the maximum term of imprisonment is a far more reliable

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[6] See, *e.g.*, 7 U.S.C. 2024(b)(1) and (c); 18 U.S.C. 751(a), 922(g)(1), 924(e)(2)(B), 3156(a)(3), 3592(c)(2) and (10); 21 U.S.C. 802(44); 22 U.S.C. 2714(e)(3); 28 U.S.C. 540A(c)(1); 29 U.S.C. 186(d)(1) and (2); 49 U.S.C. 31301(9); 49 U.S.C. 44936(b)(1)(B)(xiv)(IX) (Supp. III 2003).

indicator of a crime's seriousness than whether it happens to be labeled a "felony" or a "misdemeanor" by the State. Third, inasmuch as two States eschew the felony-misdemeanor distinction altogether, see N.J. Stat. Ann. § 2C:1-4 (West 2005); Me. Rev. Stat. Ann. tit. 17-A, § 1252 (West 2006), mere labels would not always suffice for categorizing an offense as a "crime of violence" under 18 U.S.C. 16(b). Fourth, reliance on the felony/ misdemeanor label would be particularly unsuitable under the aggravated-felony provision, because that provision attaches consequences to foreign as well as to state (and federal) crimes. 8 U.S.C. 1101(a)(43) (final paragraph).

b. Petitioner relies heavily (Pet. 6-7) on the Third Circuit's decision in *Francis* v. *Reno*, 269 F.3d 162, 166-171 (2001), which held that the label employed by the convicting jurisdiction determines whether a person has been convicted of a "felony" for purposes of 18 U.S.C. 16(b), regardless of the maximum term of imprisonment. The principal justification for the decision in *Francis* was that interpreting "felony" in 18 U.S.C. 16(b) to mean an offense punishable by a prison term of more than one year would render redundant the language in 8 U.S.C. 1101(a)(43)(F) providing that a "crime of violence" (as defined in 18 U.S.C. 16) is an "aggravated felony" only if "the term of imprisonment [is] at least one year." 269 F.3d at 170; see Pet. 7. That reasoning is flawed, for three fundamental reasons.

First, the "felony" limitation in 18 U.S.C. 16 appears only in subsection (b) of that provision. Under subsection (a), *any* offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" is a "crime of violence," 18 U.S.C. 16(a), whether it is "a felony or a misdemeanor," S. Rep. No. 225, 98th Cong., 1st Sess.

307 (1983). The at-least-one-year-of-imprisonment language in 8 U.S.C. 1101(a)(43)(F) therefore imposes an important limitation on the "crimes of violence" under 18 U.S.C. 16(a) that qualify as "aggravated felonies."

Second, classifying an offense as a "crime of violence" under either subsection of 18 U.S.C. 16 has a variety of consequences outside the immigration context. For example, Congress has criminalized certain conduct undertaken in the course of committing a crime of violence;[7] it has criminalized certain conduct undertaken by someone who has been convicted of a crime of violence;[8] and it has criminalized certain conduct that has as an element the commission, attempted commission, or intended commission of a crime of violence.[9] In those contexts, 8 U.S.C. 1101(a)(43)(F) has no application at all, and thus the language in that provision on which the Third Circuit relied could not render the term "felony" redundant even when 18 U.S.C. 16(b) is applied in those contexts.

Third, the "felony" limitation in 18 U.S.C. 16(b) refers to the sentence that was authorized by law, whereas the condition in 8 U.S.C. 1101(a)(43)(F) that "the term of imprisonment [is] at least one year" refers to the sentence that was actually imposed, see *United States* v.

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[7] See 15 U.S.C. 1245(b) (possession or use of ballistic knife); 18 U.S.C. 25(b) (Supp. IV 2004) (use of minor).

[8] See 18 U.S.C. 931(a) (Supp. IV 2004) (possession of body armor).

[9] See 18 U.S.C. 842(p) (distribution of information relating to explosives, destructive devices, and weapons of mass destruction); 18 U.S.C. 521(c)(2) (criminal street gangs); 18 U.S.C. 1952(a) (travel in aid of racketeering); 18 U.S.C. 1956(a) (money laundering); 18 U.S.C. 1959(a) (violent crime in aid of racketeering); 18 U.S.C. 2261(a) (interstate domestic violence); 21 U.S.C. 841(b)(7)(A) (distribution of controlled substance).

Pacheco, 225 F.3d 148, 153-154 (2d Cir. 2000), cert. denied, 533 U.S. 904 (2001); *Alberto-Gonzalez* v. *INS*, 215 F.3d 906, 909-910 (9th Cir. 2000); *United States* v. *Graham*, 169 F.3d 787, 789-791 (3d Cir.), cert. denied, 528 U.S. 845 (1999).[10] The two limitations thus have independent functions. Nor are all the crimes covered by each limitation necessarily subsumed in the category of those covered by the other. As explained above, a "felony" under federal law is an offense for which the authorized term of imprisonment is *more than* one year, whereas the condition in 8 U.S.C. 1101(a)(43)(F) is that the term actually imposed is "*at least*" one year. The latter condition would be satisfied, but the former would not, if the alien was convicted of an offense that carried a maximum sentence of one year of imprisonment and was sentenced to the one-year statutory maximum. Conversely, the former condition would be satisfied, but the latter would not, if the alien was convicted of an offense that carried a maximum sentence of more than one year and was sentenced to a term of less than one year.

4. Petitioner asserts (Pet. 6) that the Fifth, Seventh, and Ninth Circuits have also addressed the question presented in the petition and have come to the same conclusion as the Third Circuit in *Francis*. That assertion is mistaken. The Fifth and Ninth Circuits have expressly declined to address the question presented here, on the ground that the crime at issue was not a "felony"

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[10] That condition was satisfied here, because petitioner was sentenced to a term of imprisonment of 401 days. Gov't C.A. Br. 5. That is true even though part of the sentence was suspended, *ibid.*, because "term of imprisonment" in the statute means "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment * * * in whole or in part," 8 U.S.C. 1101(a)(48)(B).

under any conceivable definition of the term. See *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 883-885 (5th Cir. 2006); *Ortega-Mendez* v. *Gonzales*, 450 F.3d 1010, 1015 (9th Cir. 2006). The Seventh Circuit decision on which petitioner relies, *Flores* v. *Ashcroft*, 350 F.3d 666 (2003), likewise had no occasion to address the question, because the crime at issue there—a Class A misdemeanor—was not punishable by more than one year in prison, see Ind. Code § 35-50-3-2 (2004).[11]

Petitioner also asserts (Pet. 5-6) that the Second, Fourth, Sixth, Tenth, and Eleventh Circuits have addressed the question presented in the petition and have reached a different conclusion than the Third Circuit in *Francis*. That assertion is also mistaken. The cases on which petitioner relies addressed an entirely distinct question: whether a misdemeanor can be an "aggravated felony" under the immigration laws if it otherwise satisfies the applicable definition. (Each case holds that it can.) See *Pacheco*, 225 F.3d at 154-155; *Wireko* v. *Reno*, 211 F.3d 833, 835-836 (4th Cir. 2000); *United States* v. *Gonzales-Vela*, 276 F.3d 763, 766-768 (6th Cir. 2001); *United States* v. *Saenz-Mendoza*, 287 F.3d 1011, 1013-1015 (10th Cir.), cert. denied, 537 U.S. 923 (2002); *United States* v. *Christopher*, 239 F.3d 1191, 1193-1194 (11th Cir.), cert. denied, 534 U.S. 877 (2001).[12]

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[11] The other Third Circuit decision cited by petitioner (Pet. 6) simply followed *Francis*'s holding that 18 U.S.C. 16(b) "relies on the state's grading of [an] offense to determine whether it is a 'felony.'" *Singh* v. *Gonzales*, 432 F.3d 533, 538 (2005).

[12] The other court of appeals decisions cited by petitioner (Pet. 6) addressed the same question (and reached the same conclusion). See *Graham*, 169 F.3d at 791-793; *United States* v. *Urias-Escobar*, 281 F.3d 165, 167-168 (5th Cir.), cert. denied, 536 U.S. 913 (2002); *Guerrero-Perez* v. *INS*, 242 F.3d 727, 730-737 (7th Cir. 2001); *United States* v. *Gonzalez-*

Francis, therefore, is the only court of appeals decision cited by petitioner (and the only one of which we are aware) that has addressed the question whether a crime punishable by more than one year of imprisonment is a "felony" under 18 U.S.C. 16(b) if it is classified as a "misdemeanor" under state law. See also note 11, *supra* (noting that Third Circuit followed *Francis* in *Singh*). And although *Francis* incorrectly answered that question no, the decision below (which in any event is unpublished) does not conflict with *Francis*, because the Tenth Circuit was not asked to, and did not, decide that question in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2007

Tamariz, 310 F.3d 1168, 1170-1171 (9th Cir. 2002), cert. denied, 538 U.S. 1008 (2003).